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# In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

*Petitioner*,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Public employees have a First Amendment right not to be demoted on patronage grounds. It has long been recognized that employees can be punished neither for engaging in politics nor for *not* engaging in politics. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976). In the decision below, the Third Circuit took this protection away from employees who are not engaged in politics but whose employers think they are.

In defending the Third Circuit's bizarre departure from settled law, respondents make three principal claims, all of which are incorrect.

First, respondents argue (Resp. Br. 8-24, 31-38) that in order to be protected by the First Amendment against patronage demotions, a government employee must be engaged in political activity. This is the same mistake the Third Circuit made below. The First Amendment bars a government supervisor from demoting an employee for the purpose of suppressing political affiliation, whether or not the employee works on a campaign or takes a political position. Under this Court's precedents, it makes no difference whether an employee is politically active or utterly uninterested in politics. All public employees are equally protected against politically vindictive supervisors.

Second, respondents profess (Resp. Br. 24-31) to fear a flood of frivolous lawsuits from disappointed public employees. Until the decision below, however, every circuit that addressed the question recognized that the First Amendment protects politically inac-

tive public employees from politically motivated employment decisions made by supervisors who incorrectly perceive the employees as political opponents. These circuits have not seen any flood of frivolous lawsuits. The United States—the largest public employer in the country by a wide margin—does not fear a flood of frivolous lawsuits. Nor should it, because trial courts can weed out implausible claims at the pleading stage in this area of law just like in any other.

Third, respondents claim (Resp. Br. 39-46) that it would be poor "policy" for the First Amendment to protect employees like Jeffrey Heffernan who have not taken political positions. To the extent policy concerns will inform the Court's decision, however, they point entirely against respondents' view. In the decision below, the Third Circuit drastically curtailed the First Amendment rights of public employees, and protected the ability of government supervisors to make kneejerk, factually erroneous, politically vindictive employment decisions. If this case presents an occasion for balancing these two interests, the balance is not even close.

## I. The First Amendment bars a public employer from demoting an employee for the purpose of suppressing political affiliation, regardless of whether the employee is politically active.

Respondents contend that a public employee must have a "protected affiliation" (Resp. Br. 15) before the First Amendment will bar the government from

punishing him on political grounds. In respondents' view, the First Amendment protects Democrats, Republicans, and avowed independents (*id.* at 15-16), but it does not protect a "politically agnostic" (*id.* at 9 n.1) employee who has not espoused a political position or engaged in political activity. Respondents believe that politically-motivated employment decisions are unlawful only if the employee has "engaged in ... activity protected by the First Amendment" (*id.* at 13) or "[i]f the employee has a political association" (*id.* at 16).

The Court's precedents are to the contrary. The First Amendment protects all public employees from politically-motivated demotion, including those who have not declared any political position or engaged in any political activity.

"The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, *or to not believe and not associate*." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990) (emphasis added). For this reason, in its cases involving the First Amendment rights of public employees, the Court has never distinguished between employees with political affiliations and those without. Both sets of employees are protected against politically-motivated demotions.

For example, the *Rutan* plaintiffs had not engaged in any political activity. Their supervisors nevertheless violated the First Amendment by denying them promotions because they "did not have the support of the local Republican Party." *Id.* at 67. On respond-

ents' view, the *Rutan* plaintiffs should have prevailed only if they were avowed Democrats or independents, but not if they were agnostic or politically inactive, because in the latter case they would not have engaged "in any activity protected by the First Amendment" (Resp. Br. 8). The Court did not make the distinction respondents think is so important. Instead, the Court recognized that the First Amendment protects politically inactive employees just as much as the politically active.

Likewise, *Elrod*, 427 U.S. at 349 (plurality opinion), characterized the question presented as involving whether the First Amendment protects public employees from being discharged "because of their partisan political affiliation *or nonaffiliation*" (emphasis added). The *Elrod* plaintiffs had not engaged in any political activity. Yet their supervisor violated the First Amendment by firing them for not being members of the Democratic Party. *Id.* at 351, 373. Again, the Court did not inquire into whether they were Republican, independent, or agnostic, because employees who do not affiliate politically are protected just as much as those who do.[1]

Respondents' proposed distinction between the independent and the agnostic would make little sense.

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[1] Respondents err in contending (Resp. Br. 5) that "if the chief of police *correctly* understood that petitioner was not a supporter of the mayor's opponent, he could constitutionally transfer him for any reason or none at all." Under *Rutan* and *Elrod*, the chief of police could not constitutionally demote Heffernan for the purpose of suppressing political affiliation, even if the chief correctly understood that Heffernan did not support the mayor's opponent.

The harm in political patronage consists of the "restraint it places on freedoms of belief and association." *Id.* at 355. Employees fired for not adopting the boss's preferred political position will feel that restraint just as keenly whether they are independent or agnostic. If a newly elected mayor were to fire all municipal employees and replace them with contributors to his campaign, politically inactive employees would suffer just as much as the politically active.

Given that even an employee with no political involvement whatsoever is protected by the First Amendment, the present case is an easy one, because Jeffrey Heffernan was hardly agnostic about the mayoral election. He was as close to a political campaign as one could be without actually campaigning. He had been friends with Spagnola, the candidate, for decades. Pet. App. 2a-3a. He wanted Spagnola to win. Pet. App. 3a. His mother was a Spagnola supporter. Pet. App. 3a. Heffernan knew many of the people involved in the Spagnola campaign, because Spagnola was a former police chief. Pet. App. 2a. Heffernan went to the location where Spagnola campaign workers were giving out signs. Pet. App. 3a. He chatted with Spagnola's campaign manager, while holding a Spagnola campaign sign. Pet. App. 3a, 16a. He drove the sign to his mother's house, so she could plant it in her yard. Pet. App. 3a. For these activities, respondents demoted him. Even if respondents were correct that an employee must engage in political activity before the First Amendment will protect him, Heffernan would win this case, because he engaged in the quintessential polit-

ical activities of attending a campaign gathering and picking up a campaign sign.

Respondents discuss at length (Resp. Br. 16-24) the various factors that are balanced in the cases involving punishment of an employee for his *speech*, but this case is about political patronage, not about speech. Indeed, this case *could* not be about speech, because the District Court found that Heffernan did not engage in speech. Pet. App. 25a-27a. The speech cases and the patronage cases are governed by completely different doctrinal frameworks. Unlike punishment motivated by political patronage, which is unlawful full stop, punishment based on an employee's speech is governed by a test that requires the balancing of several factors. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996). Respondents' discussion of these factors is beside the point in the present case, where there are no factors to be balanced.

Respondents also misunderstand *Waters v. Churchill*, 511 U.S. 661 (1994). The plurality's statement in *Waters* that "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information," *id.* at 679, refers to the Due Process Clause, not, as respondents would have it (Resp. Br. 33-34 & n.5), to the First Amendment. The very next sentence explains that due process protects employees only by giving them "a right to adequate procedure," not a right to factually correct outcomes. *Waters*, 511 U.S. at 679. Contrary to respondents' view, this paragraph of *Waters* does not stand for the remarkable proposition that a public

employer can escape the First Amendment simply by committing a factual mistake.

Thus in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court held that a public employer violated the First Amendment by firing employees "solely because they were Republicans," *id.* at 508, even though one of the fired employees was actually a Democrat, *id.* at 509 n.4. The Court applied the First Amendment standard to the employer's perception of the employee's political affiliation, not to the employee's actual political affiliation. Because the employer "regarded him as a Republican," *id.*, and fired him on that ground, the employer violated the First Amendment.

Political patronage is thus an unconstitutional reason for demoting a public employee, whether or not the employee engages in politics, and whether or not the employer correctly perceives the employee's political affiliation. The fact that Jeffrey Heffernan was not campaigning for Spagnola does not deprive him of the First Amendment's protection against being demoted on patronage grounds.

## II. This has been the law for many years without provoking the flood of frivolous lawsuits respondents profess to fear.

Respondents profess (Resp. Br. 24-31) to worry that governments will be overrun with frivolous litigation if the First Amendment protects the politically inactive. This fear is unfounded.

Until the decision below, every circuit that addressed the question had recognized that politically

inactive public employees are protected by the First Amendment from politically motivated employment decisions made by supervisors who incorrectly perceive the employees as political opponents. *See Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that affiliation."); *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 300 (6th Cir. 2012) ("we adopt the reasoning of the First and Tenth Circuits and hold that retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine"); *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) ("our only relevant consideration is the impetus for the elected official's employment decision"). These circuits were not concerned about a litigation explosion. They have not been flooded with frivolous lawsuits filed by disappointed public employees.

Moreover, for many years the lower courts have recognized mistaken-perception claims under Title VII, the Americans with Disabilities Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act. Pet. Br. 24 n.1; U.S. Br. 28-32. The sky has not fallen. Respondents' professed fear of too much litigation is also irreconcilable with another of respondents' assertions (Resp. Br. 42-43)—that state law provides ample protection for employees who are mistreated the way Heffernan was. The sky has not fallen in state court either.

If respondents' fears had any substance, the government that would be forced to defend the biggest share of all these frivolous lawsuits would be the

United States, which is the largest public employer in the nation by a considerable margin. Yet the United States does not fear a flood of frivolous lawsuits. U.S. Br. 25-26 n.5. As the United States correctly observes, trial courts can dismiss frivolous suits at the pleading stage in this area of law just like in any other.

Respondents' parade of horribles is based on a mistaken premise—that if the First Amendment protects politically inactive employees against patronage demotions, it would become possible for any plaintiff to get to trial simply by asserting that the defendant had a mistaken belief about the facts underlying some aspect of his case. This premise is incorrect. Unlike respondents' hypotheticals, the present case involves clear, undisputed evidence that a public employee was demoted for holding a campaign sign, at a campaign event, while speaking with a campaign manager. Indeed, this case is a singularly poor one in which to raise the specter of frivolous lawsuits, because Heffernan *won* this case before a jury, only to have the verdict vacated when the trial judge retroactively recused himself. Pet. App. 4a.

The hypotheticals conjured by respondents are quite different. They involve flimsy, implausible allegations that would never survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). For example, respondents imagine (Resp. Br. 26) a case in which unsuccessful applicants for a detective position claim that "respondents mistakenly thought that they too were supporters of the mayor's opponent." But such "naked assertions devoid of further

factual enhancement" are insufficient to get past a motion to dismiss. *Iqbal*, 556 U.S. at 678 (citation, brackets, and internal quotation marks omitted). Rather, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Respondents' hypotheticals fall well short of this standard. For many years trial courts have been dismissing implausible complaints in public employment cases. Respondents offer no reason to doubt trial courts' continued ability to do so.

Respondents and their amici also err in asserting that New Jersey law offers additional remedies that Heffernan could have utilized. The New Jersey Civil Rights Act, N.J. Stat. § 10:6-2 (Resp. Br. 42-43, NCSL Br. 20)) does not create substantive rights but is simply the state analogue to 42 U.S.C. § 1983. Both statutes provide a cause of action for the violation of constitutional rights, so the Question Presented in this case would be the same under either statute. The New Jersey Civil Service Act, N.J. Stat. § 11A:1-1 *et seq.* (NJSLM Br. 5-11), prohibits reprisals for an employee's "political activities or affiliations," N.J. Admin. Code § 4A:2-5.1(b) (applied to civil service employers by *id.* § 4A:1-1.2), the very things respondents insist are a requirement for First Amendment protection as well. Finally, amici make the astonishing suggestion (NJSLM Br. 13-14; NCLS Br. 8-17) that constitutional protections should melt away when state law allows employees to negotiate analogous protections through collective bargaining. The notion that unionized employees have fewer constitutional rights than non-unionized employees

is contrary not just to common sense but to the Court's public employment cases, which make no such distinction. *See, e.g.*, *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (applying the ordinary First Amendment standard in a case involving unionized employees). In any event, a state could not weaken the First Amendment by providing parallel statutory protection, so it makes no difference whether New Jersey law would also offer relief.

## III. The Third Circuit's idiosyncratic view drastically curtails the First Amendment rights of government employees and allows employers to make kneejerk, politically vindictive employment decisions.

Respondents suggest (Resp. Br. 41-42) that the benefits of the Third Circuit's new rule exceed its harms. But this calculation is based on a misapprehension of both sides of the balance.

On one side, the Third Circuit's view allows a government supervisor to make kneejerk, factually erroneous, politically vindictive employment decisions, like the one respondents made in this case. The Third Circuit's idiosyncratic rule incentivizes supervisors to make baseless accusations about their employees, and then rewards them for being wrong. Under the Third Circuit's view, the most irresponsible employers gain a power that is denied to all other employers.

On the other side of the balance, the Third Circuit's view drastically curtails the First Amendment rights of government employees. If the Third Circuit is correct, any public employee could constitutionally be fired if her boss wrongly perceives insufficient political support. Public employees would have to walk on eggshells every day at the workplace, for fear of leaving the boss with the wrong impression. Anything an employee says or does could be a ground for dismissal.

As we explained in our opening brief (at 27-28), public employees such as police officers and teachers are routinely asked to contribute to their supervisors' campaigns. In all circuits but the Third, employees can decline these requests without fear of losing their jobs, because the First Amendment protects them from retaliation whether or not they are politically active, and whether or not they support their supervisors' opponents. Not so in the Third Circuit, where declining to contribute is now a perilous option, because it may lead the boss to suspect, even incorrectly, that an employee is a political opponent.

The Third Circuit's new rule thus benefits the worst government supervisors, while it harms millions of public employees. There is no reason to depart from the Court's traditional view that the First Amendment protects all government employees, regardless of whether they participate in political campaigns.

## IV. Respondents have waived the arguments that the police chief had a neutral policy banning all partisan activity and that political loyalty was an appropriate requirement for Heffernan's job.

Amici raise two arguments that should not be addressed because they have been waived by respondents and because they are not encompassed within the Question Presented.

First, the United States suggests (U.S. Br. 27-28) that on remand the District Court may need to determine whether Heffernan was demoted pursuant to a neutral policy barring all partisan political activities. Respondents, however, have never argued that Heffernan's demotion was lawful on this ground. While Police Chief Wittig did claim in a deposition to have an unwritten policy to that effect, no one else in the office had ever heard of such a policy before this suit was brought. Perhaps for this reason, respondents did not attempt in their motion for summary judgment to justify Wittig's demotion of Heffernan on the basis of this ostensible policy. Nor did respondents make this argument before the Third Circuit. Nor did they make this argument in their opposition to certiorari. Nor do they make it in their brief. The Court should therefore not address whether this issue remains open for the District Court to resolve.

Second, amici National Conference of State Legislatures et al. suggest (NCSL Br. 32-39) that political loyalty was an appropriate requirement for Heffer-

nan's job as a police officer. This too is an argument that respondents have never made at any stage of this litigation—neither in the District Court, nor in the Third Circuit, nor in opposing certiorari, nor in their brief. In the decision below, the Third Circuit correctly noted that this issue is not present in this case. Pet. App. 6a n.1. Such an argument would not succeed on the merits in any event. *See Fuerst v. Clarke*, 454 F.3d 770, 773 (7th Cir. 2006) (Posner, J.) ("The sergeants in the Milwaukee County Sheriff's Department are not policymaking officials" under *Branti* and *Elrod*); *Stephens v. Kerrigan*, 122 F.3d 171, 176 (3d Cir. 1997) ("the positions of [police] sergeant and lieutenant do not require a political affiliation"). Amici place great stress on Heffernan's access to "confidential information," NCSL Br. 37, but all police officers have access to confidential information. That does not entitle the police chief to require loyalty to the mayor as a condition for retaining one's job as a police officer.

Because respondents did not properly raise either of these grounds below or in this Court, they may not defend the Court of Appeals' judgment on these grounds. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009).

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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